A))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2327 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

T.K. RABARI

Versus

GUJ SHEEP & WOOL DEVELOPMENT CORPN LTD

Appearance:

MR S TRIPATHY for Petitioner

MR SV RAJU for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 12/06/2001

ORAL JUDGEMENT

#. The petitioner is challenging an order passed by the Managing Director of the Gujarat Sheep and Wool Development Corporation Limited dated 15.12.1986 by which the petitioner is removed from the services of the

Corporation.

#. The petitioner was initially appointed as Field Assistant on 22.12.1978. By the impugned order at Annexure-A/L services of the petitioner were terminated. The petitioner was informed by the Department by letter dated 15.4.1985 that his request for medical leave is turned down and immediately he is recalled for duty at Chuda Center of the Corporation after handing over his charge to the Field Officer at Ranpur. It is specifically mentioned in the said letter that if the petitioner fails to hand over the charge of the center, he will be subjected to the departmental proceedings and intervening period will be treated as leave without pay. The medical certificate which was sent by the petitioner was also rejected and the petitioner was asked to submit a certificate of the Civil Surgeon, Surendranagar showing him to be unfit for duty. It seems that the petitioner had not resumed his duty at the transferred place i.e. at Chuda. It seems that the petitioner was transferred from Ranpur to Chuda, but he has not resumed his duty and in pursuance of his application for leave on medical ground, the Department passed the aforesaid order dated 15.4.1985 of which reference is made. Thereafter, by another letter dated 29.10.1985 the petitioner was asked to resume his duty at Chuda Center immediately. The petitioner was informed that he is not remaining present at Chuda Center and that he has also not handed over the charge in spite of the order of the Corporation dated 4.4.1985 and that at a belated stage he has handed over the charge on 24.7.1985 and that after resuming his duty he has remained absent again from 22.7.1985. The petitioner was therefore asked to show cause as to why the departmental inquiry should not be initiated against him on the ground of unauthorised absence, indiscipline and insubordination. The petitioner was asked to give his reply within 8 days from the receipt of the aforesaid notice. The petitioner gave reply to the said show cause notice by his reply dated 6.11.1985. The petitioner pointed out that initially he went on leave for 29 days after submitting leave report, but subsequently his wife fell sick and that he had incurred heavy debts as he has not received the salary since six months and that he is in ruinous financial position and he will report for duty moment there is an improvement in the family condition. Thereafter, by another letter dated 14.8.1986 the Department informed the petitioner that he is not remaining present on duty regularly and that lastly from 20.7.1986 to 2.8.1986 he was not present on duty at the center, and therefore, the petitioner was asked to show cause within 10 days as to why he should not be removed

from the services of the Corporation. The petitioner replied the same by his reply dated 30.8.1986 wherein he has pointed out that after resuming his duty in Banaskantha District he is not keeping good health and that his wife is also not keeping good health. He also pointed out that for a period of 12 days from 24.6.1986 to 5.7.1986 his leave was sanctioned by the Regional Extension Officer by his order dated 24.7.1986. It seems that thereafter without any further inquiry by an order dated 15.12.1986 the petitioner was relieved / removed from services of the Corporation on the ground of remaining absent from duty. It is stated in the said order that the petitioner was given notice on 29.10.1985 and thereafter he had resumed his duty by reporting before the Regional Extension Officer, Palanpur on 17.12.1985, but again he was served with the notice on 18.8.1986, but in spite of that he has not improved and even subsequently also he remained absent at another center i.e. Rah. It is stated in the order that the petitioner is not interested in service and therefore, he is removed from service. The impugned order is at page 32 at Annexure-A/L.

#. The petitioner has challenged the said order on the ground that the same is passed without complying with the principles of natural justice and without holding any regular departmental inquiry. Initially, the petitioner had filed Special Civil Application No.6622 of 1986, but since alternative statutory remedy was available, the said petition was not entertained by this Court and the petitioner was relegated to the alternative remedy.

#. The petitioner thereafter preferred Departmental Appeal. The appellate authority dismissed the said appeal. The appellate authority gave absolutely irrelevant reasons while dismissing the appeal as the reference was made in connection with some criminal case. The order of the appellate authority suffers from total nonapplication of mind as the real issue involved in the matter has not been considered by the appellate authority. The petitioner accordingly filed this special civil application challenging his removal from the services of the Corporation.

#. At the time of hearing of this petition, it was argued by Mr.Tripathy for the petitioner that initially when the petitioner remained absent from duty, he had submitted a medical certificate which was wrongly refused by the authority. Relying upon the pay-slips he further submitted that there was absolutely no cause for giving another notice dated 14.8.1986.

#. It is further argued by Mr.Tripathy that in any case the order in question is passed without complying with the principles of natural justice as except giving him show cause notice, no further inquiry is held and therefore the impugned order of removal is nullity and the same is passed without following the principles of natural justice. Under these circumstances, it is prayed that the petition is required to be allowed and the petitioner should be given full backwages for the intervening period. It is further argued by Mr.Tripathy that there was no basis for issuance of notice at the second stage as the petitioner had already resumed the duty and was paid salary and actually incorrect statement was made in the notice.

#. Mr.S.V.Raju, learned advocate appearing for the Corporation has strongly submitted that the petitioner was a temporary employee and therefore, on the ground of his unsatisfactory work he has been relieved from service. It is not necessary for the Corporation to hold the departmental inquiry. He further submitted that in any case the petitioner can be said to have been abandoned his services as he was not remaining present on duty. Mr.Raju further submitted that in any case even if it is presumed that the order is penal in nature, than also the petitioner was given adequate opportunity as he was asked to give his explanation and the petitioner has also given reply to the show cause notice and after considering his reply, the impugned order was passed. He therefore submitted that there is no breach of the principles of natural justice in the instant case. He further submitted that in any case alternatively even if this Court comes to the conclusion that the petitioner is required to be reinstated, looking to the past conduct of the petitioner, no backwages should be awarded in his favour.

#. Mr.Raju further argued that the order in question is an order of simpliciter discharge and therefore it was not necessary for the Department to hold regular departmental inquiry. Mr.Raju has relied on the judgments of the Honourable Apex Court to substantiate his say that if a person who is in temporary employment and if he is remaining absent habitually, his services can be terminated on the ground of unsuitability and for that purpose it is not necessary to hold any inquiry. Mr.Raju has relied upon the judgment reported in (1997)11 SCC, 437. In the aforesaid judgment it has been held by the Supreme Court that in view of the adverse remarks in character roll for four out of five preceding years,

coupled with petty punishments awarded during that period, competent authority reached a finding that the respondent's performance was not satisfactory. In such circumstances, termination of his service in terms of service rules by paying him one month's pay in lieu of notice was held not punitive. It is held that, it is therefore, not necessary to comply with Article 311(2) of the Constitution. It is also held that mention in the counter-affidavit of the department about unsatisfactory work of the employee and he being a habitual absentee reasons for his non-confirmation did not alter the nature of termination. Mr.Raju therefore argued that since the petitioner was a temporary employee, his service can be terminated for unsatisfactory work and for that purpose even if his habit of remaining absent is taken into consideration, it cannot be said that the order in question is punitive, and therefore, it is not necessary to hold inquiry.

#. Mr.Raju has further relied on the judgment reported in (1997) 2 SCC 191. In the aforesaid judgment the Supreme Court has held that the services of the probationer were terminated for unsatisfactory performance on the ground that he was regularly remaining absent and therefore it is held that such order is not stigmatic. The reason mentioned in the order was the motive and not the foundation as a ground for dismissal. Under these circumstances, it was found by the Supreme Court that during the period of probation, the authorities are entitled to assess suitability of the candidate and if it is found that the candidate is not suitable to remain in service they are entitled to record a finding of unsatisfactory performance of the work and duties.

##. Mr.Raju has also relied on the judgment reported in (1996)7 SCC 546 wherein the Honourable Apex Court has held as under :

"It is not possible to accept the appellant's contention that for exercising power under section 11(2) of the Act no enquiry is required to be held and considering the nature of the Force and the utmost necessity of maintaining discipline giving a show cause notice should be regarded as sufficient compliance with the principles of natural justice. Section 11 is silent in this behalf and it appears that earlier there was no rule indicating the circumstances and the manner in which that power was to be exercised. But now Rule 20 provides for termination of service for misconduct. Rule 21

> provides for appointment of an enquiry officer and the procedure to be followed by him. Rule 22 provides for imposition of penalty. Sub-section (4) of Section 11 makes the exercise of any power under that section subject to the provision of the Act and also the Rules. Therefore, after introduction of Rule 20 in the Rules it cannot be validly contended that no enquiry need be held while exercising the power under section 11(2). The show cause notice clearly appears to have been issued in terms of sub-rule (1) of Rule 20. The first sentence in the notice that "You have been absent without leave with effect from 21.12.1983" satisfied the requirement of sub-rule (3). When it further stated that "I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable" it complied with the requirement of sub-rule (1) and as required by sub-rule (2) it was further stated therein that "I therefore, tentatively propose to terminate your service by way of dismissal". The respondent was called upon to show cause within seven days as required by sub-rule (6). No further inquiry was held; but it has to be held that nothing further was required to be done in the instant case. The respondent did not reply to the notice. There was no denial of the allegations and no request to hold an enquiry. Therefore, it was not incumbent upon the Director General to appoint an enquiry officer to conduct an enquiry in the manner prescribed by Rule 21. Thus the prescribed procedure was followed before passing the dismissal order. The courts below have wrongly held that the order of dismissal was illegal."

##. I have considered the rival submissions of both the sides. I have gone through the impugned order. It is not in dispute that the impugned order of removing the petitioner from duty is passed on the basis of his remaining unauthorisedly absent. The impugned order does not say anywhere that the petitioner's performance during his temporary tenure of appointment or during probation period is unsatisfactory. The impugned order nowhere states that the petitioner has abandoned his services. Considering the earlier show cause notices and replies of the petitioner, it is clear that the impugned order is passed mainly on the ground that the petitioner is frequently remaining absent unauthorisedly. It is not in dispute that the petitioner was serving since last more

than 10 years. There is nothing on record to show that the petitioner is continued on probation. Mr.Raju has faintly submitted that there is no automatic confirmation in service, but unfortunately neither the petitioner nor the respondent has placed the original appointment order on record. It is true that there was no specific confirmation order in favour of the petitioner. Apart from the aforesaid fact, there is nothing in the impugned order to suggest that considering the overall record of the petitioner, he is not found suitable and because of unsuitability his services are terminated. On the contrary, looking to the fact that the petitioner was given show cause notice to which the petitioner had replied and thereafter without considering his reply, the aforesaid impugned order is passed. In fact the foundation of the order itself is absenteeism on the part of the petitioner. The foundation of the order is not unsuitability or unsatisfactory work of the petitioner. Only reason for terminating the services of the petitioner is absenteeism. Therefore, it is not possible to believe that because the petitioner was a temporary employee and since in order to assess the suitability, ultimately his so-called misconduct of remaining habitually absent from service is taken into consideration and that ultimately considering his service record, he was found to be unsuitable for continuation in service. In order to find out the real motive, one has to read the impugned order and looking to the impugned order, there is no doubt in my mind that his services are terminated only on the ground of remaining absent. The reason for terminating the service of the petitioner of so called habitual absenteeism naturally creates stigma and the order in question cannot be said to be an innocuous, simpliciter discharge order on the ground of unsuitability. The order in question as such is punitive in nature. Simply because the petitioner might have continued on temporary basis, it is no ground to dispense with the regular departmental inquiry. In the instant case, the impugned order is passed merely after giving show cause notices to the petitioner. No specific charges have been framed. No regular departmental inquiry is conducted and even without considering the replies of the petitioner to the show cause notices, the order of removal is passed without complying with the principles of natural justice i.e. without framing of charges and holding of regular departmental inquiry. In my view, therefore, the impugned order is clearly in violation of the principles of natural justice. Under these circumstances before removing a person from service on the ground of so called misconduct of remaining absent, adequate opportunity was required to be given

which is not given in the present case.

##. At this stage, reference is also required to be made to the Division Bench's judgment of this Court reported in 1994(1) GLR 317. The Division Bench in paragraph 9 of the said judgment has held as under :

> "The perusal of the impugned order of termination disclosed that there was a reference to a Health Department's Report dated 28th November, 1989 and it is pursuant thereto that the impugned order was passed on 30th November, 1989. When this order is read, alongwith the averments made in paragraph 5.1 of the affidavit-in-reply, one can presume that the said report of the Health Department must be relating to the conduct of the respondent in refusing to work when she was given the slide containing blood to examine. We have no doubt that it is this particular incident, which led to the passing of the impugned order and, therefore, this is not a case of termination simpliciter. The petitioner has been dismissed from service, because of her conduct in refusing to do work. The learned Single Judge, therefore, has been right in coming to the conclusion that the principles of natural justice should have been complied with".

##. Since the issue whether the petitioner was a probationer or not is not raised in the petition nor is there any material in this connection, it is not necessary for me to decide the said question. However, looking to the impugned order, it is clear that it is not a simpliciter termination order, but the order is passed because of the misconduct on the part of the petitioner. Even if services of a temporary employee is to be dispensed with on the ground of misconduct, inquiry is required to be held against him. The appellate order is also equally bad as it has considered irrelevant things like settlement of criminal case etc. Under these circumstances, it is not possible to accept the say of Mr.Raju that the petitioner's services were terminated only on the ground of unsatisfactory work on the part of the petitioner.

##. However, considering the facts of the present case, it is clear that the order in question is passed not on the ground of unsatisfactory work on the part of the petitioner. Under these circumstances, it is incumbent upon the authority to hold regular departmental inquiry and the petitioner was required to be given adequate

chance to defend his case. Since that opportunity is not given to the petitioner to defend his case, the impugned order cannot be sustained and it will have to be set aside. It is not possible to believe that the services of the petitioner were terminated on the ground of unsatisfactory work during the probation period. As stated earlier, the impugned order is absolutely silent in this connection. It is not stated in the order that the petitioner is on probation and that his work is unsatisfactory and he is remaining unauthorisedly absent and therefore he is not required to be continued in service.

##. In this petition, of course, it is not necessary for me to give findings on the point whether the petitioner is continued on probation or not. The impugned order is required to be set aside only on the ground that the same is passed without giving adequate opportunity to the petitioner to defend his case. Under these circumstances, the impugned order is quashed and set aside. The petitioner is ordered to be reinstated in service. However, considering the fact that the petitioner was negligent in performing his duty by remaining absent unauthorisedly, this is not a fit case in which backwages are required to be given to the petitioner. The petition is accordingly partly allowed by reinstating the petitioner in service on his original post with continuity of service along with other benefits except the backwages. The Corporation is directed to reinstate the petitioner in service on or before 15.7.2001. From 15.7.2001 the petitioner will be entitled to receive his regular salary and other consequential benefits. Rule is made absolute to the aforesaid extent with no order as to costs.

(P.B.Majmudar,J)
(pathan)